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ANTI-FORMALISM IN RECENT CONSTITUTIONAL THEORY†

*Mark V. Tushnet**

I. INTRODUCTION

Constitutional theory consists in the main of theories of judicial review.[1] Almost all recent work in the field takes as its central problem what Alexander Bickel called the "countermajoritarian difficulty" with judicial review.[2] Writers examine the dimensions of judicial review on the premise that there is something normatively troubling about a practice that allows a small group of people, called judges, to displace the otherwise legally authoritative decisions of a somewhat larger group of people, called legislators, who are selected by processes that seem closer to the normatively attractive mechanisms of democracy than those that select judges.[3] The dominant tradition offers what I call "formalist" solutions to the countermajoritarian difficulty.

The focus in constitutional theory on judicial review rests on a much deeper political theory than the phrase "countermajoritarian difficulty" standing alone suggests. Majoritarian or democratic decision making is itself a solution to a set of problems that arise from a

† A number of those whose works are discussed here generously commented on an earlier version. Because most disagreed with the fundamentals or details of my interpretation of their work, the usual disclaimer is more than usually necessary.

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1. Sometimes political scientists criticize this focus. For example, Martin Shapiro has forcefully argued in favor of theories of constitutional law that treat courts as actors in the political arena. Shapiro, *Recent Developments in Political Jurisprudence,* 36 W. POL. Q. 541 (1983). Others have attempted to convert constitutional theory into the theory of the good social order. *See, e.g.,* Harris, *Bonding Word and Polity: The Logic of American Constitutionalism,* 76 AM. POL. SCI. REV. 34 (1982); Murphy, *An Ordering of Constitutional Values,* 53 S. CAL. L. REV. 703 (1980). These latter efforts, however, seem to be only different versions of one sort of the formalism underlying lawyers' constitutional theories. *See* text at note 10 *infra.*

2. A. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962).

3. In some versions, the normative difficulty arises from concern for efficient government. Wholly apart from differences in character between courts and legislatures, judicial review introduces some redundancy in decision making. The costs of redundancy may be worth bearing if redundancy improves the quality of the outcome in some specified sense, to a significant enough degree. For a discussion of this issue, see Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court,* 86 YALE L.J. 1035 (1977). The formalisms discussed below, *see* text at note 10 *infra,* attempt to specify both the sense in which the quality of outcomes can be improved, and the institutional differences between courts and legislators that lead theorists to think that redundancy improves quality in the specified sense. Notice that what is at issue are not absolute judgments about the courts' abilities with respect to some issue, or the legislatures', but comparative judgments about differences at the margin.

particular view of human nature and political action. In this Article, I identify, explicate, and criticize some recent developments in constitutional theory which are of interest to the extent that they reject that view of human nature and politics. I take as my focus important articles by Robert Burt, Robert Cover, Owen Fiss, Frank Michelman, and Cass Sunstein. I argue that the line of thought expressed by these authors attempts to displace concern with the countermajoritarian difficulty rather than to allay such concern.[4]

The remainder of this section sketches the political theory that underlies the dominant tradition in constitutional theory, and indicates how what I call anti-formalist themes can be introduced into the discussion. It also outlines how such themes can be linked to an alternative tradition of discourse about politics and the Constitution. Section II recapitulates the central debate that occupied constitutional theory a generation ago, the debate over whether constitutional decisions should rest on a process of balancing or should instead express certain absolute judgments. I argue that the debate ended with a victory for the position that was more consistent with the dominant tradition's political theory and therefore provoked the more recent attention to formalist theories of constitutional adjudication. Section III examines recent anti-formalist tendencies in constitutional theory. These tendencies take several forms. I argue that each is flawed by one of two difficulties. Either their adherents are unwilling to confront the implications for social reform of their rejection of the political theory underlying formalism or, more attractively, their proponents know that under current political circumstances they are unable to pursue the analysis more fruitfully.

A. *The Hobbesian Problem of Social Order and the Role of Formalism*

Constitutional law and constitutional theory are components of the political theory of liberalism. For the purposes of the present sketch, we can locate the origins of that theory in the work of Thomas Hobbes. Hobbes made a radical individualism the premise of his work. He assumed that people were of roughly equal physical power and that each person sought solely to advance his or her individual goals.

4. Although I argue that these authors all articulate anti-formalist themes, I do not contend that they agree on all the important issues. In particular, Fiss' desire to privilege the law-making acts of judges sharply distinguishes his work from the others'. *See* text at notes 110-14, 177-78 *infra*. Michael Perry's work also contains anti-formalist themes. I have commented on them elsewhere. *See* Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683 (1985); Tushnet, *Legal Realism, Structural Review, and Prophecy*, 8 U. DAYTON L. REV. 809 (1983) [hereinafter cited as Tushnet, *Legal Realism*].

Further assuming that everyone's primary goal was to achieve the maximum material satisfaction, Hobbes concluded that life would degenerate into the war of all against all, as each person sought to grab from every other as much as he or she could.[5] Under those circumstances, life would indeed be "nasty, brutish, and short."[6]

To avoid this unpleasant result, Hobbes proposed that people create a political order. They would relinquish their claim to subordinate others to their desires. Having done so, they would find that their security in their possessions had increased even though they could no longer coerce others into transferring still more wealth to them. In contemporary terms, by creating a political order, people would maximize the present value of their future holdings.[7]

Hobbes understood that some mechanism had to be available to guarantee that no one would behave strategically: relinquish a claim to coercion, wait until others had done so as well, and then grab what he or she could. The political order needed an apparatus to prevent the grabbing, which would otherwise produce the breakdown the order was designed to avoid. That apparatus, the state, of course itself posed a coercive threat to the satisfaction of individual desires. Not only would it coerce people into not grabbing what they could; even worse, by securing sufficient power to do that, it would be in a position to grab what *it* could. More precisely, on Hobbes' individualist assumptions, the state is an institution composed of people motivated in just the same way that everyone else is. The people occupying positions of state authority could use their positions for their own purposes. Hobbes could reasonably conclude that, even so, life with the Leviathan would be better than life without it. But it was surely less convincing to say that life would be not quite so nasty and brutish, and a little longer, than to say that life would be fulfilling.

Constitutional law and constitutional theory offer an alternative to

5. C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM 9-100 (1962), lays out the argument in detail.

6. T. HOBBES, LEVIATHAN ch. 13, at 62 (1651) *quoted in* C. MACPHERSON, *supra* note 5, at 23. Although the images might not be quite so lurid, that conclusion follows even if we relax Hobbes' insistence on acquisitiveness as the individual's primary motivation. What matters is Hobbes' individualism. Some or all of us might include in our preference schedules the satisfaction of someone else's preferences. We would then think of ourselves as altruists, but because our preferences could be satisfied by coercively imposing on others solutions "they" desired, we would in fact be paternalists. For a discussion of altruism, see T. NAGEL, THE POSSIBILITY OF ALTRUISM (1970), concluding that altruism is possible only on nonindividualist premises. *See also* Brilmayer, *A Reply,* 93 HARV. L. REV. 1727, 1732 n.34 (1980). Hobbes' individuals thus live in a social order characterized by the pervasive risk of coercive subordination of their preferences to those of the greedy or the paternalistic.

7. For a recent presentation and defense, see Levin, *A Hobbesian Minimal State,* 11 PHIL. & PUB. AFF. 338 (1982).

the Leviathan. They agree that there is a problem of social order and that it can be solved only by creating some sort of coercive state. But, unlike Hobbes, constitutional law and theory argue that the coercive power of the state can be limited, without destroying its ability to prevent the degeneration of the social order. The limitations come in a variety of forms, usefully captured in the general term "the rule of law." Constitutions create the state, but they also impose limits on what the state can do. They define criteria for appropriate legislative action and, pursuant to the rule of law, provide mechanisms by which inappropriate exercises of coercive state power can be checked or remedied. One of those mechanisms is judicial review.[8]

Yet judges no less than other occupants of positions of state power are people whose motivations fit the Hobbesian mold. Unless checked, they will use their positions to advance their own interests. Either they will coerce others in order to enhance their income — in cash, respectability, the rush one gets from exercising power, or otherwise — or they will coerce them paternalistically. Constitutional theory purports to provide the relevant checks. But the way it does so is important. Subject to qualifications discussed below,[9] judicial review limits the legislature by interposing coercive legal authority between the legislature and the person upon whom it attempted to act. The courts will enjoin action beyond constitutional limits, award damages for completed actions that exceeded those limits, release persons held pursuant to unconstitutional actions, refuse to provide their own aid in enforcing unconstitutional actions, and the like. Constitutional theory cannot act on judges in a similarly coercive way. There is no political institution whose own coercive authority constitutional theorists can call upon to discipline judges who abuse their power.

Instead, constitutional theory constrains judges by providing a set of public criteria by which theorists, interested observers, and the judges themselves can evaluate what the judges do. The set varies according to the theory offered as a constraint. The criteria might be adherence to the norms understood by the framers to be embodied in the Constitution, adherence to the best systematic moral philosophy consistent with the decided cases, enforcement of the norms of the democratic process, or many others.

These criteria have characteristics that lead me to call them "for-

8. The countermajoritarian difficulty arises because, on standard arguments, the social mechanism that best aggregates individual preferences, in the sense that it maximizes the satisfaction of those preferences, is majority rule. For a summary, see D. MUELLER, PUBLIC CHOICE 208-18 (1979).

9. *See* text at notes 58-108 *infra*.

malisms." Each formalism consists of a relatively limited number of propositions, ordered in a way that makes it relatively clear which criterion has priority over others in what circumstances. In order to provide the basis for the evaluation that constrains judges, it must be possible to deploy the criteria in particular cases in relatively uncontroversial ways: The criteria may have margins about which there can be argument in specific cases, but they must have relatively well-defined cores about which there can be no question.[10] Otherwise constitutional theory will fail to provide the public constraints that it demands.

B. *The Anti-Formalist Displacement of the Question*

Given the intellectual power of the Hobbesian tradition, it is not surprising that formalist themes have dominated recent constitutional theory. The first move a new participant makes in the ongoing dialogue about constitutional theory is to criticize the available formalisms as a predicate for offering a new one. The particular critiques of course vary depending in part on the stage of the overall conversation when the new participant enters. However, taken as a whole, the body of work criticizing particular formalisms is persuasive enough to support an inductive generalization that there is something wrong with the entire enterprise.

In a sense, anti-formalist themes enter the discussion at this point. Instead of criticizing some or all formalisms as failing to provide the constraints on judges that liberalism requires, anti-formalist writers reject as irrelevant the search for constraints. They could do so for one of at least two reasons. First, anti-formalists might deny that we need to constrain coercive power at all, no matter where it is lodged. They could contend either that coercive power does not exist, or that we need not fear unconstrained exercises of coercive power. I will call these "anarchist" anti-formalisms, because both reject the proposition that there is something especially problematic about lodging coercive power in the state. Second, anti-formalists could reject the search for constraints by denying the premises upon which that search rests. Specifically, they could assume that people are not individuals in the Hobbesian sense, that, rather than standing apart from the rest of society, each of us is able to give our life meaning only by participating in

10. I have inserted the word "relatively" in these formulations to indicate that, as used here, "formalism" does not mean a theory in which results can be derived from the criteria by employing standard operations of deductive logic. In short, formalism is not mechanical jurisprudence. But to do what constitutional theory must do in the Hobbesian world, formalisms must place some bounds on possible results.

a community whose actions are guided by public values that transcend the aggregation of individual preferences.

Anarchist and public value anti-formalisms are, for reasons I will discuss, quite hard to pin down these days. The texts I will examine rarely develop their anti-formalist themes into complete statements. But it is well at the outset to emphasize that anti-formalism can draw on a tradition of nonliberal political thought that is part of American constitutionalism.

Recent scholarship on the political theory of the Constitution has concluded that it is inaccurate to regard American constitutionalism as merely Lockean (and therefore, in the relevant respects, Hobbesian) in inspiration.[11] The Lockean emphasis on the rule of law as a constraint on power was accompanied by, and understood in the context of, a tradition of civic republicanism. The Lockean tradition assumed that people were self-interested, that their self-interest would be expressed in the political arena, and that constraints on power were therefore necessary. The republican tradition agreed that people were self-interested in some arenas of activity. But it denied that self-interest necessarily infected the arena of political activity, in a well-ordered society. There people acted as citizens, aiming to achieve the public good rather than to advance their private interests. In this tradition, citizens did not have to be constrained as they went about conducting the public business.

The Lockean and republican traditions were both vibrant ones to the framers of the Constitution.[12] A useful example comes from Madison's contributions to the *The Federalist*.[13] *Federalist 10* is concerned with curing the mischiefs of faction, a concern that rests in the end on Lockean and Hobbesian premises.[14] Later, in *Federalist 45* and *Federalist 46*, Madison explains why Congress will not intrude on the

11. The standard sources for this account are J. POCOCK, THE MACHIAVELLIAN MOMENT (1975); G. WILLS, EXPLAINING AMERICA: THE FEDERALIST (1981), and G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC (1969). For a good short summary, providing both the intellectual and the socio-political background, see J. APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S (1984).

12. These statements are subject to all the caveats about historiography made in and implied by the argument in Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles,* 96 HARV. L. REV. 781 (1983).

13. Madison is the author of Nos. 10, 14, and 37-48. The authorship of several other essays, sometimes attributed to Madison, has not been determined. THE FEDERALIST at xxi (J. Cooke ed. 1961).

14. *See* R. DAHL, A PREFACE TO DEMOCRATIC THEORY 4-32 (1956). G. WILLS, *supra* note 11, says accurately that ideas drawn from the republican tradition repeatedly intrude on *Federalist 10*, even at crucial points. But he fails to persuade that the paper as a whole is best understood as a coherent explication of the republican tradition. Rather, it is an amalgam illustrating the vitality for Madison of both traditions.

prerogatives of state governments. Here he relies on the desire by delegates to Congress to advance the public good, which he assumes requires preservation of the states. The delegates will also have an electoral incentive to advance the public good, because, Madison argues, that is what their constituents want.

The vitality of the republican tradition has eroded.[15] Anti-formalists can draw on the documents in that tradition, which include the Constitution, to enhance their rhetoric. They can also appeal to our immanent understanding that civic republicanism expresses something important about our communal life that liberalism overlooks. But, I will argue, anti-formalists have so far failed to acknowledge that we cannot merely adopt or retrieve the republican tradition. Its vitality depends on a set of social arrangements that are no longer available to us. To develop anti-formalist themes into something more, we must transform society.

II. THE DEBATE OVER BALANCING AND ITS LEGACY TO CONSTITUTIONAL THEORY

Most of today's discussions of constitutional theory differ from the last generation's. They are concerned with the substance of constraints on judges,[16] while the last generation's discussions were concerned with the form of those constraints: Should the constraints be stated as relatively absolute rules or as the outcome of a process of balancing interests?[17] This section sketches the contours of the "balancing" debate in order to explain the emergence of formalism in today's discussions, and to develop some lines of argument that can be directed at certain anti-formalist themes to be discussed in the next section.

Justices Black, Frankfurter, and Harlan, supported by allies in the

15. L. GOODWYN, THE POPULIST MOMENT (1978), argues persuasively that the late nineteenth century Populists were the heirs to the republican tradition. A. BRINKLEY, VOICES OF PROTEST (1982), argues less persuasively that Huey Long and Father Coughlin were too. Even if these contentions are accepted, they make it clear that the republican tradition has waned almost to the vanishing point. The only real issue is in what era it essentially disappeared from public discourse.

16. The anti-formalist themes discussed below are less concerned with the substance of constraints and more with the vision of the connection between a good politics and a good society. As I suggest in the conclusion, that may explain their relative inattention to what judges actually have done recently.

17. The classics remain the best discussions: Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962) [hereinafter cited as Frantz, *Balance*]; Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963); Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428 (1967); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962); Frantz, *Is the First Amendment Law? — A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963) [hereinafter cited as Frantz, *Law*].

law reviews, discussed the propriety of "balancing" in constitutional law. Black argued that balancing — or, as I would put it more generally, pluralist theories in constitutional law — left too much discretion to judges, thus making possible judicial tyranny like that of the *Lochner* era. That argument has carried the day, indeed to the point where those immersed in recent discussions of unitary theories must almost forcibly purge themselves of contemporary ways of thinking in order to understand what the "balancing" discussion was all about.

A. *The Analytic Critique of Balancing*

Justice Black raised two objections to balancing: that it required reduction of incommensurable qualities to some common quantitative measure, and that it required what were inevitably arbitrary characterizations of the interests to be balanced.

1. *Incommensurability and Side Constraints*

He developed the first objection in cases involving state regulation of interstate commerce where the existence of the monetary measure provided by the market would seem to make reduction easy and where balancing is presumptively sensible. Black rejected the Court's position that even nondiscriminatory regulations were unconstitutional if they imposed undue burdens on interstate commerce. For example, *Southern Pacific Co. v. Arizona*[18] involved a state law limiting trains to fourteen passengers or seventy freight cars. Arizona was the only state with limits that low, and railroads were forced at the Arizona border to break up the longer trains that they found economically preferable and then reconstitute them in California. The state defended the statute, which was fundamentally the product of a struggle between labor unions and management over the intensity of work, as a safety measure. The Supreme Court found that a length limitation "affords at most slight and dubious advantage, if any, over unregulated train lengths,"[19] because it increased the number of trains and therefore of accidents, and because accidents involving "slack action," the jostling movement between one car and the next, were less severe than those that the higher number of trains caused. This conclusion invoked the balancing metaphor: "The state interest is outweighed by the interest of the nation."[20] Justice Black dissented, in part because he believed

18. 325 U.S. 761 (1945).
19. 325 U.S. at 779.
20. 325 U.S. at 783.

it impossible to balance the lives lost in accidents caused by "slack action" against the economic harms to interstate commerce.

Twenty years later, he made the point clear in an opinion for the Court upholding a state law requiring that trains carry full crews.[21] The state had claimed that full crew laws promoted safety, but the trial court concluded that any increase in safety was small "and not worth the cost."[22] Justice Black responded:

> Nor was it open to the District Court to place a value on the additional safety in terms of dollars and cents, in order to see whether this value, as calculated by the court, exceeded the financial cost to the railroads. . . . It is difficult at best to say that financial losses should be balanced against the loss of lives and limbs of workers and people using the highways.[23]

Of course, one can develop a method of making "lives and limbs" commensurable with "financial losses": it is the method used to compensate people when they have been involved in accidents. The damage awards for the loss of arms by seventy workers, legs by thirty-four, and so on, could be added up. If they exceeded the railroads' financial losses, the regulation would "on balance" — losses prevented less costs increased — be justified, but if the costs of prevention exceeded the accumulated damage awards, the balance would go the other way.

This method of balancing apparently incommensurable interests by reducing them to a common metric raises a number of problems. First, on the purely technical level, it is not clear that post-accident awards really do measure the worth of an arm or a leg. The award is supposed to be the amount that the victim would have demanded before the accident as the price for allowing the railroad to cut off his or her limb.[24] Both intuition and empirical evidence suggest that the *ex ante* price is likely to be much higher than post-accident awards.[25] And even if such discrepancies result from simple imperfections in the process by which damages are ascertained, it is unlikely that we would figure out how the imperfections actually affected the results. But without knowing that, we could not place the "true" losses to victims into the balance.

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21. Brotherhood of Locomotive Firemen v. Chicago, Rock Island & Pac. R.R., 393 U.S. 129 (1968).

22. 393 U.S. at 136.

23. 393 U.S. at 139, 140.

24. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 149-50 (2d ed. 1977).

25. *See* Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979); *see also* Kelman, *Spitzer and Hoffman on Coase: A Brief Rejoinder*, 53 S. CAL. L. REV. 1215 (1980).

Second, balancing requires that all interests be taken into account. Yet legislative interventions are likely to have extremely complex consequences, which reach far beyond the narrow setting of the case.[26] One could plausibly argue, and I suspect that some historians of business and labor have done so, that train length and full crew laws strengthened railroad labor unions, and the labor movement generally, at an important point in their development, thus making it easier for them to grow further, become more powerful in politics, promote programs of general social insurance, support Medicare, create downward rigidity in wage rates, increase the rate of inflation, and on and on. It is hard to see how a court could reasonably take all these consequences into account so as to determine exactly what the social consequences of a train length law were on balance.[27]

Third, balancing, because it requires a common measure of consequences, is likely to lead the courts to adopt some form of utilitarianism. If that is so, balancing is not truly a pluralist technique, but serves rather to conceal judicial reliance on a controversial — though perhaps correct — moral theory. Justice Black's reference to "lives and limbs" suggests that his concern went deeper than mere technical difficulties with executing the program of balancing. I take it that he regarded something like "preserving the sanctity of the body" as a limit — what the philosophical literature now calls a side constraint[28] — on utilitarian calculations, at least if a state chose to recognize that kind of limit. Introducing side constraints into the analysis leads to a new set of difficulties. One is tempted to use balancing for some things, limited by boundaries defined by the side constraints.[29] For

26. Justice Black articulated a narrow version of this point in objecting to what he characterized as the "extraordinary" trial in *Southern Pacific*, 325 U.S. at 787 (Black, J., dissenting), in which evidence about train operations and safety was introduced through live witnesses and documents.

27. The Court has implicitly acknowledged the force of this argument by taking the cost to railroads of complying with regulations as the measure of their impact on interstate commerce, rather than the difference between the cost of transportation in the absence of regulation and the cost of the next most expensive mode of transportation (which might, but need not, be the cost of transportation by regulated railroads). *See* Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 142-46.

There is an extensive science fiction literature on the complex consequences of small alterations in the past. For a recent, subtle example, see G. BENFORD, TIMESCAPE (1980). There is a similarly extensive philosophical literature about the meaning of counterfactual statements and their relation to possible worlds. For an introduction, see N. GOODMAN, FACT, FICTION, AND FORECAST (1955).

28. *See* R. NOZICK, ANARCHY, STATE, AND UTOPIA 28-33 (1974); Frantz, *Balance, supra* note 17, at 1440.

29. In Konigsberg v. State Bar, 366 U.S. 36 (1961), both Justice Harlan for the majority and Justice Black in dissent adopted this strategy. For Harlan, balancing was used in cases involving "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise," 366 U.S. at 50, with a side constraint prohibiting laws designed to

example, one might say that balancing is appropriate with respect to much of the first amendment, but that no balancing is allowed when the regulation runs up against interests in privacy. The defendant in *Stanley v. Georgia*[30] was convicted of possessing obscene materials, which had been discovered during a search of his house for bookmaking papers. Justice Marshall's opinion for the Court reversed the conviction and held that the Constitution prohibited "making mere private possession of obscene material a crime."[31] The opinion emphasized the role of "the privacy of a person's own home,"[32] as did later cases related to *Stanley*.[33]

This strategy raises a serious analytic problem, which arises in two forms. I have assumed that boundaries between balancing and side constraints could be defined, but have not indicated how. Judges might invoke substantive theories to define the boundaries,[34] but then the pluralism of the approach disappears. The second form of the analytic problem arises as a natural response to the attempt to extend *Stanley*. Judges might say, as the Court said in effect when it rejected that attempt, that what is at stake is the proper balance between privacy in general and first amendment interests in general. We define the boundaries between balancing and side constraints by balancing on a higher level. The legal literature contrasts an ad hoc, case-oriented balancing of the commerce clause cases with what it calls categorical or definitional balancing.[35] The shift of levels has obvious affinities to the philosophers' distinction between act utilitarianism and rule utilitarianism, and raises problems of a sort that philosophers have discussed in that context. These problems derive from the arbitrariness of characterizing facts and interests, and are best explored in the first amendment setting.

2. *Arbitrary Characterization*

In *Dennis v. United States,* the Supreme Court affirmed the convictions of leaders of the Communist Party for violating the Smith Act,

control speech content of a specific sort. For Black, balancing was used in a limited class of cases involving "regulations of the time, place, and manner of speaking which, though neutral as to the content of speech, may unduly limit the means otherwise available for communicating ideas to the public." Frantz, *Balance, supra* note 17, at 1429; *see Konigsberg,* 366 U.S. at 68 (Black, J., dissenting).

30. 394 U.S. 557 (1969).

31. 394 U.S. at 568.

32. 394 U.S. at 564.

33. Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); United States v. Reidel, 402 U.S. 351 (1971).

34. *See, e.g.,* R. NOZICK, *supra* note 28.

35. *See* Kalven, *supra* note 17, at 443-44; Frantz, *Balance, supra* note 17, at 1434-35.

which made it unlawful "to knowingly . . . teach the duty . . . or propriety of overthrowing . . . any government in the United States by force or violence," or to conspire to do so.[36] The plurality opinion by Chief Justice Vinson tested the convictions with a balancing approach drawn from Judge Learned Hand's opinion in the court below: "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[37] Justice Frankfurter's concurring opinion stated, "The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests . . . than by announcing dogmas too inflexible for the non-Euclidian problems to be solved."[38] Identifying the gravity of the evil and the degree of invasion of free speech that is necessary turns out to be no small task.

Under the Vinson-Hand test, it is easy enough to treat the evil as the end of civilization as we know it. Even if the realization of that evil is extremely improbable, the weight on the side of suppression will be substantial. Then all one needs to do is to characterize the invasion of free speech as the elimination of a few clandestine meetings by conspirators directed by a foreign power, and the outcome of the balance is clear.[39] Justice Frankfurter's opinion is perhaps more striking. He enumerated in detail facts that made reasonable Congress' judgment that "recruitment of additional members for the Party would create a substantial danger to national security."[40] He next wrote some flowery passages on the importance of free speech. Where one expects to find Frankfurter's statement of the balance, though, instead one finds abdication: "It is not for us to decide how we would adjust the clash of interests,"[41] for the courts must defer to Congress' determination. This resulted from Frankfurter's explicit recognition of the problem of incommensurability: where the "competing interests . . . are not subject to quantitative assessment," the "confines of the judicial process" are too narrow.[42]

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36. 341 U.S. 494, 496 (1951); *see* Frantz, *Balance, supra* note 17, at 1430.

37. 341 U.S. at 510.

38. 341 U.S. at 524-25 (Frankfurter, J., concurring).

39. *See* 341 U.S. at 578-79 (Jackson, J., concurring).

40. 341 U.S. at 547 (Frankfurter, J., concurring). Frankfurter mentioned, for instance, the Party's membership in 1947 and recent incidents of espionage. Hans Linde has pointed out that it is anomalous for a judge to rely on details like this in an opinion that defers to a congressional judgment made, if at all, in 1941. Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto,* 22 STAN. L. REV. 1163 (1970).

41. 341 U.S. at 551 (Frankfurter, J., concurring).

42. 341 U.S. at 525 (Frankfurter, J., concurring).

But the difficulty goes deeper than incommensurability. In Frankfurter's opinion we see hard facts, or so they are made to seem, counterposed to abstract values. Similarly, in my presentation of the plurality opinion we have what most judges would regard as an extremely serious evil in the abstract counterposed to an evaluation of the impact on speech-related activities in a narrow compass. That is, it seems that the courts are balancing interests that even if ultimately commensurable, are defined on different levels of generality. Advocates of balancing recognize that this kind of manipulation discredits the enterprise. They therefore insist that proper balancing has to have two characteristics: the interests and facts balanced have to be described on the *same* level of generality, and on the *right* level of generality.[43] When analyzed, both of these characteristics undermine the idea of balancing as a pluralist method.

Pretty clearly we cannot select the right level of generality within the terms of the balancing effort alone. Yet if we invoke some substantive theory of constitutional law to specify the level, we are no longer engaged in balancing. In the history of the balancing debates of the 1950s and 1960s, this proposition emerged as the disputants began to see definitional or categorical balancing as the sensible outcome of the discussion. In definitional balancing one identifies a set of interests implicated in a problem and generates a rule that achieves a proper balance among those interests. For example, in sedition cases like *Dennis* one might balance the interests in free speech and national security by noticing that restrictive statutes are likely to be enacted and enforced at times when legislatures and juries are likely to overestimate the threat to national security posed by specific dissidents and to underestimate the general value of free speech. Thus, definitional balancing might lead one to adopt a rule prohibiting the enforcement of sedition laws except when, for example, the speech is likely to lead to imminent lawbreaking.[44]

One of Justice Black's opinions on balancing theory made the same point. Justice Harlan for the majority had cited cases involving regulations of the use of streets for demonstrations, in which the Court had used the language of balancing.[45] Justice Black replied that those cases involved a special category of problems, which required that the Court define the proper balance between the use of the streets for traffic and for speech. In that category of cases the balance could be struck, for example, by a rule requiring that the streets be open for

43. *See* Fried, *supra* note 17, at 763; Frantz, *Law, supra* note 17, at 747-48.

44. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

45. Konigsberg v. State Bar, 366 U.S. 36, 51-52 (1961).

speech so long as the speech does not significantly interfere with their primary use for traffic.[46] To engage in categorical or definitional balancing, though, we need to have a substantive theory about the values of speech and the values of other activities such as traffic and protection of national security. If one desperately wants to use the language of balancing, one can say that the substantive theory identifies the proper level of generality on which interests are to be balanced. But it surely is clearer to say that the theory specifies the proper rules directly. Thus, balancing is replaced by a formal substantive theory.[47]

The identical problem recurs in a more subtle form even if we agree on the level of generality on which interests and facts are to be described. Here the problem arises because neither interests nor facts have a single description on a given level of generality. Again, *Dennis* provides a useful example. The plurality opinion described the Communist Party as

> a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders . . . felt that the time had come for action, [in circumstances of] the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom [the Party was at] the very least ideologically attuned . . . .[48]

This passage appears to be a very particularized description of the Party as it was in the late 1940s. But it is also a description of a general threat to the national security: Whenever that combination occurs, it is a threat. To put the point in general terms, abstractions or generalities are the same as concrete examples or particulars, because we can decompose the generalities into particulars, or universalize the particulars into generalities.[49] Nor do we have to perform the opera-

46. *Konigsberg*, 366 U.S. at 69 (Black, J., dissenting); *see also* Frantz, *Balance*, *supra* note 17, at 1429-30.

47. *See* Frantz, *Law*, *supra* note 17, at 734-35; Fried, *supra* note 17, at 769-70, 772-73; *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 857 (1978) (noting in "free exercise" cases the need to assess the impact of granting the exemption at issue, rather than the impact of all possible exemptions, on administration of the general regulatory statue).

48. 341 U.S. at 511.

49. This is the move that leads rule utilitarianism to collapse into act utilitarianism. *See* D. LYONS, FORMS AND LIMITS OF UTILITARIANISM (1965). Proponents of utilitarian generalization, who emphasize the importance of learnable systems of rules, are not subject to this move. *See* Kavka, *Extensional Equivalence and Utilitarian Generalization*, 41 THEORIA 125 (1975). They can however be criticized for setting up a two-level theory in which the *cognoscenti*, who can learn a complex system of rules, are free of restraints placed on the plebes who cannot. *See* Hare, *Ethical Theory and Utilitarianism*, in UTILITARIANISM AND BEYOND 23-38 (A. Sen & B. Williams eds. 1982).

For an illustration in the cases, see Nixon v. Administrator, GSA, 433 U.S. 425 (1977). The Court upheld a statute directing the disposition of the presidential papers of Richard Nixon against a challenge based in part on the bill of attainder clause, U.S. CONST. art. I, § 9, cl. 3. The Court held that the statute dealt with "a legitimate class of one" whose particular situation could be addressed while further studies were undertaken. 433 U.S. at 472. Justice Stevens concurred,

tions on both sides of the balance. We can use the general terms of national security, and balance them against the terms of a trivial incursion on free speech which, even when universalized into all cases in which a tiny group of conspirators meets clandestinely . . . and so on, remains trivial but has been shifted to the broader level of generality.

Descriptions of facts and interests, then, are not lying around for whatever use we want to make of them. Rather, the use we want to make of the facts and interests determines the descriptions we give them. In this sense descriptions are theory-laden,[50] and balancing disappears when the formalist substantive theory behind the descriptions is brought forward.

B. *The Sociological Critique of Balancing*

There is a second kind of critique of balancing, which focuses not on the logic or rhetoric of the process, but on the people who do the balancing. Not surprisingly, this sociological critique is underdeveloped: Neither the Justices nor most commentators have much to gain by developing it. The most useful text here is an article by Gerald Gunther written at the completion of Justice Lewis Powell's first term on the Court.[51] Gunther compared Powell to Justice Harlan, whom Gunther regarded as a first-rank practitioner of balancing:

> In the finest manifestations of Justice Harlan's approach to first amendment problems, . . . he viewed balancing . . . as a mandate to perceive every free speech interest in a situation and to scrutinize every justification for a restriction of individual liberty. Moreover, . . . Justice Harlan strove for unifying principles that might guide future decisions. The Harlan legacy . . . is rich in sensitive, candid, and articulate perceptions of competing concerns, and in overarching approaches which retain their capacity to instruct.[52]

Gunther thus regards balancing as requiring candor and sensitive perception, and as generating "unifying principles."

This approach is notable for the absence of any answers to questions about the level of generality. On one view of the approach, all that balancing demands is that judges do their best to see and describe what is at stake "in a situation." The difficulty with this view is that balancing then really does not constrain the judges. Indeed, it does

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citing two facts that the Court did not mention, Nixon's resignation and his subsequent pardon. 433 U.S. at 486 (Stevens, J., concurring). These facts are equally examples of more abstract elements that explain the legitimacy of the "class of one," and concrete explanations of its legitimacy in this very case.

50. The standard citation here is N. HANSON, PATTERNS OF DISCOVERY (1958).

51. Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972).

52. *Id.* at 1013-14.

not even provide a critical observer with grounds for evaluating what judges have done. A critic might say that Chief Justice Vinson failed to understand the interests implicated in *Dennis*. But in fact, Vinson described the interests he saw at stake fully and articulately, and that is all that this view asks of a balancer.[53]

The vision of "unifying principles" might provide more critical leverage and constraint. But two difficulties intrude. First, principles are generalized beyond the facts "in a situation," so that they have a "capacity to instruct."[54] But precisely because they go beyond the facts at hand, the principles necessarily obscure the interests that will in fact be at stake in the case that may arise later.[55] Second, Gunther nowhere tells us what counts as an acceptable unifying principle. His approach rules out ad hoc balancing but provides no positive criteria for identifying what else is all right.

But there is more to Gunther's approach. His sentences parse well enough and seem to be saying something, and yet they turn out to have almost no content. But their tone and manner of presentation do say something, though not perhaps what Gunther consciously intended. The article is very much written for insiders, who are assumed to share a way of looking at the world and the laws that ought to regulate it. Gunther implicitly says that we can finesse the difficulties of choosing a level of generality in describing a situation or characterizing interests, and of selecting what amount of unification a principle must provide, because all of us know what good judges ought to do. And in this he may well be correct. Yet it is hard to see why those who lose in the courts should regard the decisions of such judges as binding — why, that is, they should believe that the Hobbesian problem has been overcome. For losers may well think that the reason that all good judges know what to do is that judges are chosen by methods and according to criteria of goodness that give their decisions no authority. Insiders will not, of course, think that their methods and criteria are narrow. But outsiders will look at who judges are — mostly male, mostly secularized, mostly white, mostly rich, mostly old, all lawyers, mostly owners of stock, almost never members of labor unions, mostly tolerant of moderate use of some mind-altering drugs but not others, mostly heterosexual, mostly . . . — and may take a different view.

The sociological defense of balancing may be useful for a project

53. *See* Mendelson, *supra* note 17, at 825-26; Tushnet, *supra* note 12, at 818-21.

54. Gunther, *supra* note 51, at 1013-14.

55. *See* Tushnet, *supra* note 12, at 805-06.

like Gunther's where one insider is talking to another. Justice Powell was clearly Gunther's primary audience, and Gunther was trying to reduce Powell's conservative tendencies in favor of Gunther's liberal ones. But as a general strategy for constitutional theory it is sure to fail. The sociological defense of balancing assumes that all insiders agree on certain fundamental points, itself a questionable proposition, and, even more important, that there are no fundamental differences between insiders and outsiders. This is both false as a matter of fact in the contemporary United States and basically inconsistent with the Hobbesian premise that in the world of social interaction we are all outsiders at one time or another, as conspiracies of those who wish to exploit us seek to employ the coercive power of the state against us.

To the extent that the coherence of balancing depended on insiders' self-assurance, it was an approach fitting for the decade of the American Century and the End of Ideology. Challenges to that self-assurance forced the defense of balancing back from an implicit sociology to an explicit jurisprudence. But a pluralist jurisprudence fails to provide the constraints on judges that Justice Black knew were required by what he took to be the premises of liberal political thought. On his view, and in the Hobbesian tradition generally, the subjects of a liberal state cannot accept pluralism in the courts. It is bad enough that legislatures can oppress them, but at least judges will keep legislatures in check. Pluralism in constitutional theory makes it impossible to keep judges in check.

C. *The Legacy of the Balancing Debate*

It is difficult to recapture the intensity of the balancing debate because Justice Black's position overwhelmed the balancers.[56] After the balancing debate was adjourned,[57] attention turned to developing the proper formalist theory that would generate the necessary constraints on judges. In a sense, the critiques of each formalism are the residue of the balancing debate. Each critique finds flaws at the foundation of the formalism being considered. A generation ago those flaws would have seemed irrelevant because balancers would offer a solution drawn from some other theoretical stance to deal with them. The result would be the balancers' dream: a world of doctrine drawing on a plu-

56. *But see* Section III. B. *infra*.

57. I believe that the balancing debate occurred when it did because the social divisions to which the sociological critique draws attention had not been seen as fundamental until the 1960s. (It is significant too that Justice Black, a New Deal Democrat, began articulating his critique of balancing on the basis of his political experience, in which the interests of unions and corporations were sharply at odds.)

rality of theories. Justice Black's victory deprived theorists of that strategy. Once a formalism's flaws are uncovered, it becomes entirely unworkable.

Scholars have substantial incentives to develop critiques of each other's formalisms. Were one to examine the field as an intellectual historian, one would find in contemporary constitutional theory an imposing amount of scurrying from one theory to another. Commentators rest on the ground occupied by representation-reinforcing review or systematic moral philosophy, only to move on as soon as the inevitable critiques are produced. If only to gain some time to catch one's breath, anti-formalism begins to seem attractive. Yet anti-formalism itself must avoid the critiques of balancing. As we will see, the sociological critique of balancing poses a particular problem for most anti-formalisms.

III. Anti-Formalist Themes in Recent Constitutional Theory

This section identifies three types of anti-formalist themes in a number of important recent works. I emphasize that I will extract themes from larger arguments. The works considered here do not, on the whole, elevate those themes into full-scale arguments. Further, at times I will pursue those themes in directions the authors might not have seen and indeed might disclaim as parts of their work. I do so because much of what I find interesting in the work lies in those directions, and paying stricter attention to the authors' intentions would make less provocative their reliance on anti-formalist themes.

A. *Anarchist Anti-Formalism*

Formalisms are efforts to establish a governmental structure in which constraints are placed on the exercise of coercive social power at every level. Anarchists deny the normative validity of any exercise of coercive social power. Anarchist anti-formalism in recent works has taken two forms. One denies that coercive social power exists, thus making irrelevant the search for constraints. The other denies that exercises of coercive social power have any normative differences from exercises of coercive individual power, thus recreating the Hobbesian state of nature and thereby forcing us to consider not the countermajoritarian difficulty but the majoritarian one.

1. *The Anarchism of Dialogue*

Robert Burt's article, *Constitutional Law and the Teaching of the*

Parables,[58] argues in effect that the concern with constraining judges is seriously misplaced. We mistake what is going on when we think that judges making decisions on constitutional issues are exercising a form of social power while constraining the exercise of another form. Instead, Burt argues, they are engaged in a continuing dialogue with the legislature and the public, in which the judges invoke the Constitution as a rhetorical device to suggest a better course to us, not to coerce us into following their advice.

a. The Argument. Burt's essential perception is that, in some circumstances, competing claims of right are offered by those who do not see themselves as parts of the same community.[59] Any coercive resolution of their dispute necessarily accepts one side's definition of the community and thereby excludes the other. Thus, Burt argues, these disputes ought not be resolved by the coercive imposition of a solution. Instead, courts should invite the parties to consider redefining what each believes to be the community, by reminding them of the deeper claims — to personal identity, to humanity, to social peace, and the like — to which they say they are also committed.[60] For Burt, the much criticized decision at the remedial stage of *Brown v. Board of Education*[61] is exemplary. The Court there reached its "proper limit" in "say[ing] . . . that the dispute in its current posture cannot legitimately be resolved and that accordingly the particular resolution . . . that one party has imposed on the other is invalid."[62] It properly "did not [go on to] dictate the scheme that would replace" segregation laws,[63] because that would be simply to impose the other party's resolution.

Burt reaches this point because he understands one of the important lessons of legal realism. One of the driving forces of his argument is the illusory nature of the belief, held by the Court and others, that it has "power . . . to secure obedience in practice."[64] At least in contentious cases, "every action of [the Court] carries the same fundamental implication" of "weakness," of "vulnerability [and] . . . dependence on others."[65] Though they utter words that usually imply that coer-

58. 93 YALE L.J. 455 (1984).

59. I find Burt's article extremely elusive, and frequently find myself thinking that what it says is inconsistent with Burt's apparent intentions. I suspect that the elusiveness is deliberate, in order to make the article exemplify as well as describe the pedagogic value of parables.

60. Burt, *supra* note 58, at 455-56, 471, 479-80, 501.

61. 349 U.S. 294 (1955).

62. Burt, *supra* note 58, at 485.

63. *Id.*

64. *Id.* at 474.

65. *Id.* at 476.

cion will follow noncompliance, we know that the courts are weak because the degree of compliance varies tremendously. The Court said in 1962 that school-initiated prayer in public schools was unconstitutional,[66] but in 1983 the practice continued.[67] Burt's central example in this context is *Brown* itself, which initiated — or more precisely was located in the middle of — an extended process of adjustment; it did not impose a resolution in fact. For Burt, law is dialogue, not coercion. Concern about constraints on the exercise of power is irrelevant because judges do not exercise power. They only invite the rest of us to consider "claim[s] for inclusion in a communal relation."[68]

b. The Critique. What we know about compliance with legal commands gives powerful support to Burt's analysis. But Burt fails to pursue the argument far enough, to a full-scale anarchism. By focusing on judges and the Constitution, he suggests that legislative law is something different, that is, is coercive in a way that judicial law is not. That suggestion is wrong. By confining his attention to a subset of especially contentious cases, he suggests that his anarchism can be similarly confined. That suggestion too is wrong. Finally, by criticizing some recent decisions as closing off the legal dialogue, Burt fails to grasp the implications of his emphasis on the court's weakness.

i. Compliance and Legislation. Burt insists that, instead of resolving legal disputes, we insert them into an ongoing process of social dialogue and education. The judgment entered by a court in a litigated case does not involve the exercise of coercive social power, because the entry of the judgment determines nothing; it is just another move in the continuing dialogue. Issues are presented to the courts, decisions are made there, commentators in the legal academy and the popular press respond to them, entrepreneurial legislators try to piggy-back their own programs on to what the courts have said, other legislators try to get some mileage out of opposing what the courts have done, and so on indefinitely.

Nothing in this version of the argument claims anything special about courts as places where this dialogue occurs in any privileged way.[69] One of Burt's central examples is the law of handicapped per-

66. Abington School Dist. v. Schempp, 374 U.S. 203 (1962).

67. *See, e.g., Justice Powell Halts Prayers Led by Teachers in Alabama,* N.Y. Times, Feb. 12, 1983, at 9, col. 5; *see also Hicksville Divided by Moment of Silence,* N.Y. Times, Feb. 29, 1984, at B1, col. 2.

68. Burt, *supra* note 58, at 500.

69. Burt asserts that "[i]t is misleading . . . to characterize [the] judicial role as *distinctively* coercive or nonconsensual but to describe the majoritarian institutions as grounded on democratic principle," and that the Court "reveals a *quintessential* characteristic of *all* American political institutions because it . . . shows the fragility of communal bonds in democratic theory and practice. The Court . . . points to the substratum of coercive force that necessarily lies beneath

sons, in which the courts' initial role was the limited but important one of raising the general rights consciousness of the society, after which Congress and the state legislatures took over, only to find the courts again intervening, and not nearly so sympathetically as those encouraged by the rights rhetoric probably hoped.[70] The complexity of the interchange between the public, legislators, and the courts is what makes it sensible to treat Burt as offering an account of coercive social power that dissolves that power wherever it appears, and not just an account of how courts do and ought to behave.[71]

ii. Criteria for Judicial Intervention. Burt frames his argument around situations in which the parties "define themselves as diametrically and irrevocably opposed to one another, . . . [with] no shared communal interest or value."[72] But in the course of the argument he dances around the question of determining when those situations arise. His argument gains its rhetorical power by its use of two core examples, segregation and the rights of the retarded, with which he correctly assumes most of his readers will be sympathetic.[73] He does however state "an elusive criterion" for judicial intervention: "the importance of the dispute, either because of its general social signification or its intense urgency to some few who are directly affected by it."[74]

There are two difficulties here. First, Burt appears to want to distinguish between people who lose because they are coercively excluded from the community (or who lose in being so excluded), and people who lose even though they have "shared communal interest[s]"[75] with the winners. His use of segregation and the rights of the retarded sug-

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relations between people who might otherwise be divided by deep-rooted antagonisms." *Id.* at 465 (emphasis added). *See also id.* at 484 n.93 (criticizing Michael Perry for attempting to identify "principles for hierarchically ranking the relative authority of judicial and majoritarian institutions"). For a discussion of Burt's effort to identify a distinctive judicial role nonetheless, see text at notes 98-108 *infra*.

70. *Id.* at 489-500. *But see id.* at 497 (legislative action rested on prior judicial determinations of unconstitutionality).

71. A similarly complex interchange among citizens, legislators, and courts occurred *before Brown v. Board of Education.* Constitutional theorists' belief that all they need to know is contained in the *United States Reports* leads them to start the story with *Brown.* But before *Brown* there was a sustained effort to secure the passage of anti-lynching legislation, a threatened march on Washington that led to the creation of a wartime Fair Employment Practices Commission, the desegregation of the armed forces, and so on.

72. Burt, *supra* note 58, at 456-57.

73. He also slips in a brief discussion of abortion. *Id.* at 488. The rhetorical force of his argument would be diminished, I suspect, had he placed the abortion issue at its center. Certainly, though, the social forces that generated the abortion decisions, the decisions themselves, and the social response that followed them, would have provided at least as good an example — in my view a better example — of the processes with which Burt is concerned.

74. *Id.* at 484; *see also id.* at 500 ("the proper occasions for . . . judicial intervention . . . will depend on many complicated considerations").

75. *Id.* at 457.

gests an affinity to John Hart Ely's concern for representation,[76] with all its attendant difficulties.[77] One of those difficulties deserves mention here. Burt would allow judicial intervention when a dispute is "intensely urgent" to some people,[78] and is concerned with situations in which people "define themselves" as opposed. This psychologistic emphasis at least raises questions about cases in which people do not urgently feel or define themselves as excluded precisely because they have been so successfully excluded as to make their situation seem natural to them.[79] Further, Burt's "elusive criterion" suggests the possibility that what we might call "political therapy" would lead more losers to begin to see themselves as actually excluded. Thus, just as he offered an untenable distinction between legislation and adjudication to limit the anarchist implications of his argument, here Burt offers an equally untenable distinction between mere losers and the excluded to the same end. His arguments are indeed more deeply anarchist than Burt recognizes.[80]

The second difficulty arises from the search for a criterion of intervention itself. Formalisms develop their criteria because they must constrain the exercise of coercive power. But Burt's anti-formalism should lead him to eschew the search for such criteria. On his analysis, because law is dialogue rather than coercion, it simply does not matter when courts intervene. What they do has no final consequences; it all plays itself out in the continuing dialogue. This difficulty combines with the previous one in an interesting way. Sometimes decisions appear to be (relatively) final. But on Burt's analysis the finality is illusory. A dialogue may end by "invoking superior coercive force to impose silence" or by "a mutually agreed end."[81] Yet distinguishing between coerced and agreed-upon silence is impossible in the absence of an understanding of what community is. Until we have that understanding, there can be no final decisions.

iii. The Possibility of Dialogic Stops. Like most commentators, Burt finds some decisions of the Supreme Court deeply disturbing. His candidates are cases invoking state autonomy to deny claims for

76. J. ELY, DEMOCRACY AND DISTRUST (1980).

77. *See e.g.*, Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories,* 89 YALE L.J. 1063 (1980).

78. I note my puzzlement at the meaning or importance of *"directly* affected" in Burt's statement of a criterion. *See* text at note 74 *supra.*

79. *See* J. ELY, *supra* note 76, at 165-66; Tushnet, *Talking to Each Other: Reflections on Yudof's* When Government Speaks, 1984 WIS. L. REV. 129, 136-40.

80. *But see* Burt, *The Constitution of the Family,* 1979 SUP. CT. REV. 329, 378 n.144.

81. Burt, *supra* note 58, at 488.

"mutual engagement and obligatory dialogue"[82] such as *Pennhurst State School v. Halderman*.[83] These cases treat "the simple assertion of the wish to avoid association as intrinsically justified without any need to account for, or listen to, competing claims."[84] Rather than leaving the dialogue open, the Supreme Court in these cases closes it off.

Once again Burt betrays his own argument. If all law is dialogue, nothing within the domain of law can terminate the conversation. Consider three examples Burt offers of judicial attempts to impose closure on the conversation. In two the attempt clearly failed; what will happen in the third remains an open question.

Dred Scott v. Sandford[85] "shut off the possibility" that blacks would be heard in the federal courts.[86] But the discussions that constitute the law continued, in the Lincoln-Douglas debates, in Congress, and ultimately on the battlefield. Burt was willing to take the long view of *Brown,* citing actions by the Court and Congress in 1968.[87] Thirteen years after *Dred Scott,* the fourteenth amendment was adopted.[88]

According to Burt, "[t]he Supreme Court wrongly held itself to be the authoritative calculator" in the initial abortion cases.[89] The dialogue on the abortion issue has surely intensified since 1972. The Court in *Roe v. Wade*[90] purported to remove from the legal system consideration of the question of the fetus' status as a person. I suspect that, as a result, contemporary discussions of the abortion question are more concerned with that, and other associated issues, than were the more pragmatic discussions in the 1960s.[91] All of this certainly con-

82. *Id.* at 489.

83. 451 U.S. 1 (1981).

84. Burt, *supra* note 58, at 489 (footnote omitted).

85. 60 U.S. (19 How.) 393 (1856).

86. Burt, *supra* note 58, at 489.

87. *Id.* at 485.

88. It is possible to distinguish the periods on the basis of the amount of overt violence in each (directed by white people at white people). I would be hesitant to put much weight on such a distinction, however, because it ignores the routine violence of everyday life, *see* B. MOORE, SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY 426-30 (1966) (on violence attendant to "peaceful" social transformations in England and United States), and because it is likely to suffer from historical amnesia. On violence during the Second Reconstruction, see Belknap, *The Vindication of Burke Marshall: The Southern Legal System and the Anti-Civil-Rights Violence of the 1960s,* 33 EMORY L.J. 93, 102-03, 109-10 (1984).

89. Burt, *supra* note 58, at 488 n.106.

90. 410 U.S. 113, 156-59 (1973).

91. *See* K. LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 140-41, 144 (1984). As Luker shows, the issues are considerably more complex than the distinction between pragmatic and moral arguments indicates, because the arguments are bound up with stances their proponents take toward a wide range of issues relating to modern life and their place in it.

firms Burt's original insight, but it undermines his criticism of the Court for cutting off the conversation.

Finally, Burt discusses the *Pennhurst*[92] case. There the Court refused to find that one federal statute imposed an enforceable obligation on the states to provide certain rights to the mentally handicapped.[93] But that of course was not the end of the story, which can be pursued in two directions. First, under the prodding of the lower courts' decisions, the state apparently substantially modified its policies.[94] It is unlikely that the modifications will be completely undone. Second, on remand the court of appeals reinstated its initial judgment, relying this time on a state statute.[95] The Supreme Court again reversed, holding that the eleventh amendment bars federal courts from ordering relief in the form of a structural injunction based on state law.[96] It left open for consideration on a second remand other federal statutory and constitutional claims.[97] Thus, even within the federal judicial system and with respect to the case that Burt discusses, the Court's first decision did not impose an end to the discussion.

c. The Implications. Burt's arguments lead, perhaps despite his intentions, to the position that law is not coercion and that lawmakers need not be constrained. But there is something decidedly odd about this, for it has the effect of denying that the forms of law are implicated in causing suffering. Burt's concern that dialogue be used to create the possibility for community offers a way out.

It is useful here to describe Burt's position in an earlier work. *Taking Care of Strangers*[98] examined the legal response to extreme suffering, in the context of decisions to provide or withhold medical treatment. There Burt argued that anticipatory relief in certain classes of these cases was inappropriate, because anticipatory relief would terminate a dialogue that would be fruitful for all concerned. But he did not argue that courts should refrain from deciding in a subsequent criminal prosecution or civil lawsuit whether the actions taken were in fact proper. However, that position is problematic in a number of ways. First, by failing to confront the systemic impact that subsequent relief has on behavior, the argument in *Taking Care of Strangers* was

92. 451 U.S. 1 (1981).

93. 451 U.S. at 10-11.

94. *See* Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case,* 98 HARV. L. REV. 61, 64 n.20 (1984).

95. Halderman v. Pennhurst State School & Hosp., 673 F.2d 647 (3d Cir. 1982), *revd.,* 104 S. Ct. 900 (1984).

96. Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900 (1984).

97. 104 S. Ct. at 921.

98. R. BURT, TAKING CARE OF STRANGERS (1979).

necessarily incomplete. Second, it was possible to justify the limited position taken in *Taking Care of Strangers* precisely because we always had in reserve the subsequent assessment of what the actors did. That later assessment could be used to assure us that if harm occurred, those who imposed it would be punished and those who suffered would be, to the extent possible, compensated. Burt's more recent work rectifies these omissions by denying that law can ever be coercive, either before or after the fact. For, if courts and legislatures are equally coercive,[99] and if courts are not effectively coercive,[100] it follows that neither are legislatures. But, the heavens of appellate courts aside, we know that people are indeed placed in positions to do harm by the legal system, and we ought not adopt an analysis of law that leads us to think that nothing can, in the end, be done.

Finally, there is a real and significant difference between the argumentative style of *Taking Care of Strangers* and Burt's article. In the former we were confronted with real people facing real problems. In the latter, notwithstanding what I take to be Burt's intentions, we are confronted with the abstract participants in a parable about law. Again despite Burt's intentions, Nicholas Romeo[101] and Terri Lee Halderman[102] appear in his article as the abstract "plaintiffs" of the formulations of classical legal doctrine. He wants to say that the Court was wrong in the *Pennhurst* cases, presumably because he knows that Terri Lee Halderman and Nicholas Romeo were done great wrongs, yet there is an inevitable tension between his enthusiasm for ongoing dialogue and that kind of normative proposition.

Burt believes that *Pennhurst* was wrongly decided and that Terri Lee Halderman should receive some relief. Similarly he believes that the Court in *Youngberg v. Romeo*[103] understood "the lesson of community"[104] in holding that the Constitution guaranteed Romeo, a resident of Pennhurst, a "minimally adequate"[105] program to prevent the imposition of physical or psychological harm. But once again these beliefs cannot fit into the analysis underlying Burt's express arguments. Burt's vision of law as dialogue builds in part upon our experience with structural relief of the sort involved in *Pennhurst*. The short of it is that a different decision in *Pennhurst* would very likely have

99. *See* note 69 *supra*.

100. *See* text at note 68 *supra*.

101. Youngberg v. Romeo, 457 U.S. 307 (1982).

102. Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981).

103. 457 U.S. 307 (1982).

104. Burt, *supra* note 58, at 495.

105. 457 U.S. at 319.

made no significant difference in the conditions of Terri Lee Halderman's life. The same can be said of *Romeo*. The Court held that Romeo had certain rights, which he could enforce in an action for damages. But it also held that damages would be unavailable if his custodians had failed to provide him with the required program because the state legislature denied them the resources to do so.[106]

Suffering occurs, but, on Burt's analysis, the law cannot relieve it. What does this imply? Consider again Burt's preferred actions in *Pennhurst* and *Romeo*. The Court would have kept the dialogue open (but of course the dialogue is always open). It would also have invited Halderman and Romeo into the community knowing that that invitation could be repudiated by the community. It may be as great an insult to issue invitations under such circumstances as it is forthrightly to confess the society's moral bankruptcy.

What matters here, though, is the use of the conditional verb. Certainly courts — even appellate courts — are places where, sometimes, community and shared values can be brought into being.[107] The sociological critique of balancing cautions against an excess of optimism about that: If judges are in fact much like legislators, it is unlikely that they will be inclined to promote much more in the way of dialogue than legislators are. But we need not rule out in principle the possibility of constructing a community in the courtroom. At the same time, however, we cannot, as Burt does, privilege courts over legislatures, zoning boards, and collective bargaining sessions as locations for that effort.[108]

2. *The Anarchism of Religion*

Robert Cover's *Foreword:* Nomos *and Narrative,*[109] like Burt's work, invokes religious metaphors in support of anarchism. Cover's is more thorough-going, and is explicit in refusing to privilege any locus of law creation or community building. It further recognizes the role of coercion in law creation. I believe that its only flaw is its romantic view of community. Cover fails to discuss the implications of the inference that from the premises that law creation is community building and that law creation involves violence, it follows that community building sometimes involves violence too.

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106. 457 U.S. at 323.

107. *See, e.g.,* Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law,* 11 N.Y.U. Rev. L. & Soc. Change 369 (1983).

108. *See* Burt, *supra* note 58, at 466 (courts have a "pedagogic advantage" arising from "their palpable weakness in imposing effective force on the disputing parties").

109. 97 HARV. L. REV. 4 (1983).

Explication of Cover's views can usefully begin by contrasting them with some of Owen Fiss'.[110] Fiss has said that in "legal interpretation there is only one school and attendance is mandatory."[111] The image of the legal system that this metaphor conveys is that the law is unitary, hierarchical, and, in a sense to be defined in a moment, passive. In contrast, in Cover's *Foreword* the image of the law is pluralist, antihierarchical, and active.

Just as Burt does, Cover denies that the exercise of coercive social power can be justified. He does so by insisting that every claim by every component of society that one of its legal rights has been invaded has the full status that we conventionally accord to what the schoolmasters say.[112] It is in this sense that Cover's theory is pluralist and antihierarchical: Everyone can make claims of legal right, and no one's claims of legal right, or determinations that legal rights have or have not been invaded, is entitled to privileged status. That is, what you or I say is "The Law" is on exactly the same normative plane as what a majority of the Supreme Court says is "The Law."[113] Once again, this is exactly the anarchists' claim, that no one in a position to exercise coercive power — to be a schoolmaster — has any greater claim to force others to act in one way rather than another, than does anyone else, even those who occupy no positions of nominal power.[114] Notice, however, that unlike Burt, Cover need not deny that coercive social power is ever exercised. He can acknowledge that coercion is rampant in the society without repudiating his essential point, that the exercise of that power always requires justifications so strong as to be rarely available.

This image of law is made even more attractive by what I have called its active rather than its passive character. The metaphor of the school suggests to me an enterprise in which an informed and dominating person instructs people who sit and listen, who *absorb* what is offered to them, to find out what the law is. For Cover, everyone is a lawmaker, a schoolmaster, although at that point the metaphor becomes rather less enlightening. In all our interactions, we create law. To put it in Burt's terms, our everyday dialogues, directed at each other, and not just those directed at those nominally in positions of

110. Cover discusses another portion of Fiss' views, *id.* at 43-44.

111. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 746 (1982).

112. *See, e.g.*, Cover, *supra* note 109, at 43-44.

113. *Id.* at 46-53.

114. I take it that it is not insignificant that Cover has come to defend the proposition that my conception, or yours, of "what the law is" stands on the same plane as the Court's conception at a time when it seems increasingly likely that the Court's conception will be extremely unattractive for a relatively long time.

power, are the locations where we create law. In short, Cover has told us that law is what *we* do, not what someone else does to us.

It is important to emphasize exactly what Cover's arguments establish. It is that *law* is what we do. The arguments deprive the actions of those in positions to exercise coercive social power of the normative force our culture accords to "The Law." What they do has no more claim, no less of course but no more either, to our deference than anything we do. Unlike Burt, however, Cover need not deny that those in positions to exercise coercive social power do in fact exercise it. He therefore can acknowledge the existence of real human suffering in a way that, despite his intentions, Burt cannot.

Indeed, Cover devotes a great deal of attention to what he sees as the problem of state violence, the coercive use of its version of law to suppress competing versions. Yet his exposition slips when he romanticizes the communities from which those competing versions emerge. In discussing how communities with deviant versions of law might respond to efforts to suppress them, Cover writes:

> In interpreting a text of resistance, any community must come to grips with violence. It must think through the implications of living as a victim or perpetrator of violence in the contexts in which violence is likely to arise. Violence [is] a technique either to achieve or to suppress interpretations or the living of them.[115]

Although one is not compelled to read it this way, the passage seems to imply that the community of resistance will be the victim of violence directed at it by the dominant community, or will itself perpetrate violence against that *other* community.[116]

That is acceptable enough as far as it goes. But Cover's assumption that communities, even communities of resistance, can be constituted without violence directed at their own members betrays the "theory of radical autonomy of juridical meaning" he proposes.[117] There are a number of ways to show this. First, on Cover's theory,

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115. Cover, *supra* note 109, at 50 (footnote omitted).

116. This reading is supported by the footnote to the passage quoted in the text. Cover says that he is speaking of

> communities that already have an identity [, and whose] members are . . . already bound by a . . . stable cultural understanding.
>
> . . . Violence may well be a particularly powerful catalyst . . . in the chemistry by which a collection of hitherto unrelated individuals becomes a self-conscious revolutionary force.
>
> . . . The persistent effort to live a law . . . presupposes a community already self-conscious and lawful by its own lights . . . . [A]lthough resistant groups affirming their own laws need not realize themselves in violence, they always live in the shadow of the violence backing the state's claim to social control.

Id. at 50 n.137. The sense of violence as external to the community comes through with increasing clarity as the footnote proceeds.

117. *Id.*

juridical meaning is created at every moment of social interaction. No community can guarantee that, when my friends and I wander off, the meaning we create will not contradict the "stable social understandings" that constitute the community of which we nonetheless remain a part. Our community must therefore hold in reserve the possibility of coercion, not to suppress other communities, but to assure the continuity of our own. To put it even more strongly, the threat of instability is the condition for the existence of stable understandings: Only if we know that coercion is available if we create new legal meanings can we choose to adhere to existing ones — or, perhaps better, can we choose to recreate old ones — or, perhaps best of all, can we *choose* to adhere to old ones.

One might respond to this that if "radical autonomy" means anything, it means that when my friends and I wander off, we create a new community, as to which external violence is relevant but internal violence is not. Then, however, a second difficulty arises. The metaphor of "wandering off" is dramatic but inaccurate. Cover's "radical autonomy" means that every social interaction constitutes a community for those involved in it. Thus, treating the creation of new legal meanings as a secession from an existing community actually denies the possibility of community in the first place.

Finally, Cover's vision of communities of resistance confronting problems of external violence captures some but not all of the interesting phenomena of law creation. He describes situations in which communities of resistance say, "Our law is as good as, or better than, your law." But there are situations in which such communities say, "Our law *is* your law." They are then not communities of resistance at all. They may appeal to the deeper commitments embodied in state law, as against the particular expressions of state law.[118] Or they may attempt to convert the rest of us to their views. Throughout, they insist that our effort to treat them as outsiders, to exclude them from our community, must fail because they are no different from us. In these situations, violence is internal to the community. Completing Cover's theory requires us to return to Burt's.

3. *The Anarchists' Conclusion*

The anarchisms of Burt and Cover demonstrate that constitutional theory requires a theory of community.[119] Such a theory would displace the Hobbesian concern over constraints on individual power.

118. *Cf.* R. DWORKIN, TAKING RIGHTS SERIOUSLY 134-36 (1977) (distinguishing between concepts — the deeper commitments; and conceptions — the particular expressions).

119. *See also* M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

The work of Burt and Cover suggests that an appropriate theory would treat community as being created and dissolved at every moment of social life, and would understand social life as shared values and violence, each dependent for its meaning and existence on the other.

B. *Intuitionism and Practical Reason*

A recent symposium on first amendment theory is pervaded by comments that the balancing debate is over and that everyone knows that free speech law must be developed through the use of balancing.[120] Given the success of the general critique of balancing in constitutional theory, the breadth of this agreement is surprising. After suggesting a number of ultimately unsatisfying reasons for this agreement, reasons that rest on formalist approaches to the law, I will offer an anti-formalist reconstruction of the discussion.

1. *The Coexistence of Balancing and Formalism*

One reason that participants in the symposium treat balancing as unproblematic is their distance from the more general discussions in constitutional theory. This is most dramatic in their treatment of Robert Bork's theory that would confine the first amendment to protecting certain narrowly defined forms of explicitly political speech.[121] The participants rejected this theory as inadequate on normative grounds related to the values of speech,[122] without acknowledging that Bork's approach to the first amendment was inextricably linked to a specific theory of constitutional adjudication.

That suggests a second reason for the agreement on balancing. The participants seem to agree that a proper theory of the first amendment would fit into a philosophical framework, though they disagree on the details of that framework. However, this too raises a number of problems. With minor exceptions, the participants argue that the law of the first amendment ought to consist of a mix of relatively clear rules, used in some areas, and balancing, used in others. The next task is to specify the areas. One possibility is that rules are appropriate in areas with which the Court has become familiar over the years, while balancing is appropriate in areas that the Court has only recently en-

120. *Freedom of Expression: Theoretical Perspectives*, 78 NW. U. L. REV. 937 (1983).

121. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

122. *See, e.g.*, Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1148-50.

tered.[123] One would expect balancing to disappear from those areas as time passed. This possibility therefore does not in fact endorse balancing as a matter of principle.

Another possibility is to derive the areas in which balancing is appropriate from some overarching moral theory of the first amendment.[124] But this raises two related problems. The moral theory must contain an institutional element, of the kind discussed in the next subsection, that explains why courts are the proper places to do the balancing. As we will see, it is difficult to develop that institutional argument in a convincing way. Further, the compatability of a moral-philosophical theory of judicial review with the Hobbesian premises of constitutional theory is subject to great controversy.[125]

Despite the symposiasts' agreement, balancing remains problematic within a formalist system.

2. *Intuitionism*

I have so far failed to make a distinction among forms of moral philosophy, which it is now essential to bring out. One form, which may be called "systematic," identifies a set of principles and specifies how conflicts among principles are to be resolved. Some conflicts may disappear because the system provides that one principle governs one substantive area and the apparently conflicting one governs another area. Alternatively, conflicts may be resolved by some metaprinciple that gives one rule priority over the other.[126] Systematic moral philosophies are formalisms. In contrast, intuitionistic moral philosophies identify moral principles but do not specify how conflicts are to be resolved.

Steven Shiffrin has defended intuitionistic moral philosophy,[127] and has defended balancing in first amendment cases as an application of intuitionism.[128] However, even if his defense of intuitionism suc-

123. Thus, most of the commentators are centrally concerned with obscenity and commercial speech rather than seditious speech or speech causally related to lawbreaking.

124. This is the present-day version of categorical balancing. *See* text at note 44 *supra*.

125. *See, e.g.*, J. ELY, *supra* note 76, at 48-54, 56-60. The reason for the controversy is illustrated by the authors in the symposium, who inflate what seem to an outsider to be trivial differences in philosophical statements, into wildly divergent conclusions. *Compare* Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982), *with* Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's* The Value of Free Speech, 130 U. PA. L. REV. 646 (1982).

126. *See, e.g.*, J. RAWLS, A THEORY OF JUSTICE 41-44 (1971).

127. Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103 (1983).

128. Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983).

ceeds, it cannot provide the foundation for judicial review in the Hobbesian tradition.

The reason is simple. Intuitionism may be a perfectly sensible way for each of us to arrive at our judgments so that we may seek to convince others that we are right. But intuitionism standing alone cannot tell us *whose* intuitions ought to prevail in the end. Specifically, it cannot explain why the intuitions of a majority of the Supreme Court should control rather than the intuitions of state judges or of legislators.

Consider first a relatively pure situation. The law of libel, which implicates first amendment values, is almost entirely a creation of state judges in their common law capacity. If an intuitionistic balancing is appropriate here, we need a rather strong theory of institutional differences between state courts and the Supreme Court to justify reliance on the intuitions of the latter.[129] Such differences lie in the guarantees of article III. But the most careful recent examination of those differences concedes that they are relatively small when state appellate courts are compared to the federal courts,[130] and that they have their primary impact in cases where expeditious disposition or accurate determination of the historical facts is particularly important.[131] It is unlikely that a very robust intuitionist theory of the first amendment could be built on these institutional differences.[132]

The problem of comparative institutional capacity to make intuitionistic judgments affects review of legislative action as well. Here the balancers have attempted to augment their balancing by invoking a supplementary substantive principle, a presumption against governmental restrictions on speech.[133] Once balancing enters the picture, however, that presumption cannot justify committing final judgment to the Supreme Court. The rhetoric of hostility to governmental restrictions obscures the fact that courts are agencies of "the govern-

129. Schauer, *Public Figures,* 25 WM. & MARY L. REV. 905, 926 & n.95 (1984), notes the problem but discusses only "legislators" as "the governors who enjoy the power . . . of public office." *See also* Ashdown, *Of Public Figures and Public Interest — The Libel Law Conundrum,* 25 WM. & MARY L. REV. 937, 948-51 (1984).

130. Neuborne, *The Myth of Parity,* 90 HARV. L. REV. 1105, 1118 (1977).

131. *Id.* at 1118-19.

132. This argument can be generalized to non-common law areas. The "case or controversy" requirement of article III means that every case the Supreme Court decides (other than the few within its original jurisdiction) has been processed by another court, even if the case implicates some substantive legislation. Further, Congress could channel all these cases to state courts. *But see* Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction,* 83 YALE L.J. 498 (1974). If it did, the Supreme Court would always be reviewing the intuitionist balancing a state court engaged in.

133. *See* F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 80-86 (1982); Blasi, *The Checking Value in First Amendment Theory,* 1977 A.B.F. RESEARCH J. 521.

ment" too. So long as a balancer acknowledges that there is some interest that weighs against speech in the premises,[134] the choice is always between one governmental restriction on speech that strikes one balance between speech and other interests, and another equally governmental restriction that strikes a different balance.

Once again, what intuitionists require is an institutional theory about the quality of intuitions.[135] Typically one gets a few sentences that compare the ideal judge in the ideal adjudication to real-world legislators in the "dance of legislation."[136] Usually this involves too much cynicism about legislators and not enough cynicism about judges.[137] The sociological critique of balancing suggests a more fundamental point. We ought not expect that, brief periods aside, judges are going to be much different from legislators.[138] Life tenure and the conditions of adjudication[139] may produce some small differences in the quality of their intuitions, but it would be surprising to find large differences persisting over extended periods.

In an odd way, intuitionism leads us back to Burt's position. Intuitionism cannot justify judicial review because it cannot explain why the Supreme Court's intuitions should be dispositive. But one of the reasons for that inability is that the Court's intuitions are unlikely to differ substantially from those of other institutions. And that means that judicial review does not matter much one way or the other.

3. *Practical Reason*

There is an alternative reading of the recent advocacy of balancing. I should emphasize at the start that it is in my view an extraordinarily generous reading, one that finds insights in the articles that are far removed from what appears on the surface. Those insights, whether really there or not,[140] are interesting enough to justify separate

134. If there is none, a pure due process, minimal rationality requirement will do.

135. This is not to say that hostility to governmental restriction cannot ground a formalist or systematic approach to the problems, only that it cannot ground an intuitionist one.

136. *See, e.g.*, M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 100-01 (1982); *cf.* Komesar, *Taking Institutions Seriously*, 51 U. CHI. L. REV. 366 (1984) (criticizing most constitutional theory for ignoring careful analysis of actual institutions).

137. A. MAASS, CONGRESS AND THE COMMON GOOD (1983), is a useful though undoubtedly overstated corrective to the usual cynical view of congressional politics. The romanticized view of the judicial process typified the response to B. WOODWARD & S. ARMSTRONG, THE BRETHREN (1979), though an interesting undertone along the lines, "We knew it all the time," also pervaded the response. *See* Navasky, *Review — The Selling of the Brethren*, 89 YALE L.J. 1028 (1980).

138. *See* Tushnet, *Legal Realism, supra* note 4, at 814-15.

139. *See* text at note 145 *infra*.

140. Steven Shiffrin has pointed out to me that he has expressly relied on authors who draw on the Aristotelian tradition, in Shiffrin, *Liberalism, Radicalism, and Legal Scholarship, supra*

treatment.

Balancing need not be an expression of adherence to intuitionism, a branch of moral philosophy. It may instead be a metaphor for the exercise of a particular moral-intellectual capacity, called in the Aristotelian tradition the faculty of practical reason.[141] That faculty allows us to perceive situations raising moral issues as a whole and, importantly, to apprehend the appropriate response to the situation. Apprehension, in this tradition, comes close to meaning "grasping." That is, the faculty of practical reason is not exercised by deductive reasoning from premises or by clearly articulated analogical reasoning from similar circumstances; it is exercised more directly, by responding to situations without the intervention of those modes of reason we now call logical or analytical.[142]

On one view, courts are well-suited to the task of exercising practical reason. They must passively await cases to be brought to them, and passivity may encourage the apprehension of a situation taken as a whole.[143] In contrast, the active, analytic mode of reason may encourage its user to believe that what his[144] activity has disclosed encompasses all that needs to be known. Similarly, the concreteness of real cases provides the occasion for viewing a situation as a whole.[145]

This may be a sound description of how an ideal court in an ideal society would behave,[146] but it fails as a description of courts today.[147] The difficulty is that the faculty of practical reason, like all

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note 127, at 1200 n.374, 1205 n.391. I am unsure whether this citation should have a *"see"* or *"but see"* signal.

141. This sketch is drawn from conversations with Warren Lehman and his article *Rules in Law*, 72 GEO. L.J. 1571 (1984). The leading recent discussion in which practical reason plays a central part is A. MACINTYRE, AFTER VIRTUE (1981). *See also* R. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM (1983).

142. The opposition between analytic reason and practical reason resembles that between systematic moral philosophy and intuitionism, which is one ground for the organization of this discussion.

143. I would suggest that practical reason resembles what Carol Gilligan has identified as a distinctively female mode of moral reasoning. C. GILLIGAN, IN A DIFFERENT VOICE (1982). And, though this may get me into more trouble, it has occurred to me that there might be some relation between the socialization of women into what could be called a passive role and their distinctive mode of reasoning.

144. *See* note 143 *supra*.

145. A generous reading of Brilmayer, *The Jurisprudence of Article III*, 93 HARV. L. REV. 297 (1979), and the recent work of Henry Monaghan, *see, e.g., Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985), would have it that they describe the task of the federal courts as exercising practical reason under a set of rules of justiciability designed to facilitate its sound exercise. *But see* text at note 147 *infra*.

146. However, it is not obvious to me that, under similarly ideal circumstances, legislatures would behave otherwise.

147. To the extent that the idea of practical reason grounds arguments for traditional notions of justiciability, *see* note 145 *supra*, it is particularly pernicious in supporting rules for a real society on the basis of a utopian vision of an ideal one.

human faculties, depends for its sound exercise on appropriate training and discipline. Practical reason can be exercised by good citizens in a good society.[148] But under other circumstances people will take as exercises of practical reason partial solutions to imperfectly understood situations.

The next section discusses some of the social conditions under which the faculty of practical reason might be better developed. Here I only note some reasons for thinking that we do not now live in the Aristotelian good society. First, and perhaps most obvious, the Aristotelian tradition is hardly vibrant.[149] The idea of a faculty of practical reason is, if not entirely foreign to us, at least far enough removed from our way of thinking to require some effort to understand. That itself suggests that we do not live in the required circumstances. Second, the social divisions to which the sociological critique of balancing drew attention undermine the capacity to develop the faculty of practical reason. Once we abandon Aristotle's own view that some people are by nature slaves, and instead treat practical reason as a truly human capacity, it becomes clear that differences in life chances, educations, security, independence from domination by others, and the like will significantly affect the degree to which that capacity will develop. An obvious response is elitism: Those who, in our society's terms, are better educated, more independent, and so on, are likely to have the faculty of practical reason better developed. So far as I can tell, nothing in the Aristotelian tradition, its defense of slavery aside, supports that elitism. And, in any event, any revival of Aristotelianism will have to come to terms with the intellectual legacy of the Enlightenment, which makes moral-intellectual elitism extremely suspect.[150]

Practical reason is an anti-formalist capacity. It could be captured in the metaphor of balancing. But the social conditions for its sound exercise do not exist. The final anti-formalist theme I will discuss brings out some of the dimensions of the required social conditions.

C. *Public Values*

Owen Fiss, Frank Michelman, and Cass Sunstein have attempted

148. I draw the phrase from comments by Michael Sandel at a conference on "Undergraduate Education and Legal Education," held at the Georgetown University Law Center, May 25, 1984. I take it to be a measure of my education that I am confident that the phrase has a more standard citation and that I am ignorant of what it is.

149. Without having done a systematic survey, I would nonetheless guess that serious discussions of the relationship between that tradition and law have occurred only in journals sponsored by Roman Catholic institutions. *Cf.* note 141 *supra*.

150. This is the general argument of A. MACINTYRE, *supra* note 141.

to ground constitutional theory in what they call public values. Before discussing their efforts, I find it useful to step back to examine the origins in recent constitutional theory of the idea of public values.

1. *From Common Values to Public Values*

One group of responses to Bickel's "countermajoritarian difficulty" resolves the problem by denying that judicial review is truly countermajoritarian.[151] One form of the denial is to assert that judicial review actually affirms the majority's values. When confronted with a regulation like that in *Moore v. City of East Cleveland*,[152] this response argues that the regulation is so far out of line with values widely shared among the American public as a whole as to be unconstitutional.

This appeal to common values appears to have inherent limits. It would seem unable to account for invalidation of recently enacted federal statutes,[153] for example, or for invalidation of statutes, such as those restricting the availability of abortions, that many states adopt. These limits reduce the attractiveness of the appeal to common values.

Even within its limits, the appeal to common values raises a number of well-known problems.[154] First, the level of generality on which the common values are identified is open to substantial manipulation.[155] While such manipulation allows the scope of the approach to be broadened, it is usually so transparent as to undermine the "majoritarian" defense. Second, one undeniable common value in our society is federalism. Federalism allows and indeed encourages localities to step to a different drummer and impose on themselves regulations that outsiders find distasteful.[156] Thus, any apparently ab-

151. I will not discuss the "definitional" denial, *i.e.*, that because we have come to live with judicial review as a part of our democracy, the practice cannot be inconsistent with democracy as we understand it. The definitional denial is generally taken to be inadequate. *See, e.g.*, M. PERRY, *supra* note 136, at 30-32.

152. 431 U.S. 494 (1977). There the Court held unconstitutional an application of a zoning ordinance that had the effect of prohibiting a grandmother from establishing a home with her grandchildren born of two of her children.

153. For older statutes, the "common values" approach would allow invalidation on the ground that they are inconsistent with today's common values.

154. These problems are related; indeed they may be versions of a single problem. I present them in an order that allows one to construct an intellectual history explaining the emergence of an anti-formalist theme.

155. The best example is L. TRIBE, *supra* note 47, at 944 ("Insofar as the right of personhood is limited to liberties long revered as fundamental in our society, it makes all the difference in the world what level of generality one employs to test the pedigree of an asserted liberty claim.") (footnote omitted); *see also* P. BOBBITT, CONSTITUTIONAL FATE 159-62 (1982) (deriving constitutional limits on state power to restrict availability of abortions from "ethos" barring government from coercing intimate acts).

156. Precisely because they are outsiders, critics have voted with their feet to express their

errational regulation can be defended as the expression of some complex common value, such as "Privacy, taking federalism into account."

Third, courts have before them one indisputable item of evidence about common values: the regulation at issue. They also have their sense, developed as participants in the society, of what our common values are. It is not obvious why the courts should rely on the latter rather than the former. In *Furman v. Georgia,*[157] Justice Marshall provided an explanation for his view that the death penalty was unconstitutional because it was inconsistent with the values of the American people. He argued that the general population was unaware of the way in which the death penalty is actually administered, that judges were in a position to know that, and that if the public knew what the judges did, it would oppose the death penalty.[158]

On its face, this response to the evidentiary objection to the appeal to common values is obviously questionable. The response appears to be making an empirical claim,[159] and so appears to be vulnerable to the reply Justice Stewart made in *Gregg v. Georgia.*[160] There he said that *Furman* had brought the issue to the attention of the public, and that it responded by reenacting the death penalty statutes.[161] Further, Justice Marshall's opinion has a troubling air of elitism about it, which can be dissipated only with some effort.

Perhaps Justice Marshall's approach can be defended as not relying on empirical claims. He could be appealing to what good citizens in a good society would say if confronted with the practice of the death penalty in our society. I have already raised questions about the coherence of such an approach. What is important here is the nonempirical nature of the argument. No longer can Justice Marshall appeal to "common" values, where "common" has its usual meaning of "widely shared in fact." Rather, he must appeal to some other concept of values. In the recent commentary, that alternative has received the label of "public values."

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distaste for the regulations. *Cf.* Tiebout, *A Pure Theory of Local Expenditures,* 64 J. POL. ECON. 416 (1956).

157. 408 U.S. 238 (1972).

158. 408 U.S. at 360-69.

159. For an examination of the empirical question, see Sarat & Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis,* 1976 WIS. L. REV. 171.

160. 428 U.S. 153 (1976).

161. 428 U.S. at 179-81.

2. *The Concept of Public Values*

The concept of public values expresses a vision of politics whose contours can be seen best in contrast to the alternative Hobbesian vision of politics as the process by which private interests are aggregated. Justice Rehnquist's opinion for the court in *United States Railroad Retirement Board v. Fritz*[162] expresses the Hobbesian vision. In revising the railroad retirement system to coordinate it with the Social Security system, Congress eliminated a certain type of benefit for one group of retirees while preserving it for another. The only justification for eliminating the benefit was fiscal: its elimination reduced the cost by what was regarded as just the right amount. The disadvantaged retirees pointed out that the fiscal benefits could have been accomplished in innumerable other ways, and that in any event there were no criteria for deciding what "the right amount" of reduction was. Justice Rehnquist responded that the legislation represented a series of compromises and that it was sufficient to support the statute's constitutionality to note that the disadvantaged retirees had simply lost a political battle. The Hobbesian vision thus treats politics as an arena in which private interests struggle to secure the benefits of public power.[163] It is a land in which all that happens amounts to cutting deals to one group's advantage and another's disadvantage. In such a world, it is impossible to find any legislation irrational,[164] because every statute is just the right — that is, the politically feasible — compromise among contending forces.

The Hobbesian vision of politics generates a minor doctrinal embarrassment.[165] Some also find it unattractive. They offer an alternative in which legislation can be "justified [only] by reference to some public value."[166] To Owen Fiss, "[a]djudication is the social process by which judges give meaning to our public values."[167] Frank Michelman writes:

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162. 449 U.S. 166 (1980).

163. *See also* Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities,* 1974 SUP. CT. REV. 1.

164. *See* Sunstein, *Public Values, Private Interests, and the Equal Protection Clause,* 1982 SUP. CT. REV. 127, 130-31.

165. The embarrassment is minor because rationality review by the present Supreme Court is superficial at best. For critiques, see Sunstein, *supra* note 164; Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory,* 67 CALIF. L. REV. 1049 (1979).

166. Sunstein, *supra* note 164, at 131; *see also* Sunstein, *Deregulation and the Hard-Look Doctrine,* 1983 SUP. CT. REV. 177, 183 (administrative law involves effort "to implement the public values at stake in regulatory choices").

167. Fiss, *Foreword: The Forms of Justice,* 93 HARV. L. REV. 1, 2 (1979); *see also id.* at 58 (the judge "straddl[es] . . . the world of the public value and the world of subjective preference, the world of the Constitution and the world of politics").

> Politics is a process . . . for making the self-defining choices that constitute our moral freedom. As social beings in a social world, we have such choices to make regarding . . . the moral ambience of the social world we can only inhabit together. Such choices by their nature have to be made jointly, that is to say politically. Public values, then, are a necessary accompaniment of the moral freedom of the individual.[168]

As Michelman puts it, "values . . . are public as well as private in origin, originating in political engagement and dialogue as well as in private experience."[169]

Sunstein and Michelman explicitly link their vision to the republican tradition.[170] In that tradition, public life is not just a reflex of private interests. It is a place where citizens conceive of themselves as acting to advance something they think of as the public interest, and where they come together to discuss, deliberate upon, and ultimately decide on the course their society will take.

As I indicated in Section I, this tradition was available to the framers, and was part of what they took to underlie the Constitution. However, it is unclear that the republican tradition is readily available to us. I suspect that we often dismiss appeals to the public interest as political rhetoric designed to mask a self-interested effort to advance a narrow goal. More concrete evidence comes from the rhetoric of self-styled public interest lawyers, who in reflective moments explain their activities in a purely procedural way as representing the unrepresented.[171] That is, they see themselves as injecting a neglected private interest into the bargaining processes of public life.[172]

3. *Public Values in Contemporary Law: A Critique*

The difficulty of retrieving the republican tradition suggests caution in elevating the anti-formalist appeal to public values into a full-scale constitutional theory. Three more specific criticisms of that appeal deserve particular mention.

First, the appeal rarely gives content to the public values it invokes. Sunstein's versions have a charming diffidence to them. He concludes one article with this footnote:

> It is of course a premise of this whole enterprise that such values at

168. Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487, 509 (1979) (footnote omitted).

169. *Id.*

170. *Id.*; Sunstein, *supra* note 166, at 183 n.25.

171. *See generally* Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

172. One reason for taking this stance is that it allows public interest lawyers to deflect — or at least force into more subtle forms — charges that they are elitists seeking to impose their vision of the public interest on an unwilling public. For a discussion of the subtlest version of the charges, see Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982).

> least potentially exist and that the regulatory process may serve to define them. That premise may be questioned by those who believe that, at least under current conditions, the result will be not dialogue but domination.[173]

Michelman is equally tentative.[174] Fiss provides a list of public values that suggests that he would prefer — but cannot commit himself to — an appeal to systematic moral philosophy,[175] thus restraining his anti-formalist impulses. The emptiness of the appeal to public values indicates its utopianism — under current conditions, as Sunstein carefully puts it.[176]

Second, Fiss differs from Michelman and Sunstein in explicitly intending that judges articulate and enforce public values.[177] He does so in part to combat a nihilist challenge that would "drain [the Constitution] of meaning. [The Constitution] would no longer be seen as embodying a public morality to be understood and expressed through rational processes like adjudication . . . . [T]his nihilism . . . threatens our social existence and the nature of public life as we know it in America; and it demeans our lives."[178] But this passion for the judges as they now are is mistaken in several ways. It is predicated on the view that a "public life" now exists to be threatened, a view that the relative unavailability of the republican tradition suggests is wrong. It assumes that judges, as they now are, are the kinds of people who can articulate public values, an assumption that the sociological critique of balancing brings into question.

Most important, Fiss' desire for authoritative determination of public values leads him to ignore the emphasis in the republican tradition on the process of deliberation in shaping values. Here what I

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173. Sunstein, *supra* note 166, at 213 n.135; *see also* Sunstein, *supra* note 164, at 144-45. Sunstein's most extended discussion, *Naked Preferences and the Constitution,* 84 COLUM. L. REV. 1689 (1984), is devoted entirely to defending the negative proposition that statutes are unconstitutional if they rest only on naked (Hobbesian) preferences. To survive, statutes must have at least one public value that justifies them. But again Sunstein does not spell out what such values are. *See id.* at 1694 ("A public value can be defined as any justification for government action that goes beyond the exercise of raw political power.").

174. *See* Michelman, *Political Markets and Community Self-Determination,* 53 IND. L.J. 145, 149 (1977-78) (public interest model of government depends on "belief in the reality — or at least the possibility — of public or objective values").

175. *See* Fiss, *supra* note 167, at 11; *see also id.* at 9 (the judge "searches for what is true, right, or just"). The citation, *id.* at 9 n.24, is to Dworkin. But that may simply be recourse to any port in a storm.

176. Steven Goldberg has suggested to me that the consensus on the value of public support for basic science may exemplify one public value in our society. Such support, though it may also advance the interests of a military-industrial elite, also and more importantly rests on the view that the pursuit of truth for its own sake is valuable.

177. *See generally* Fiss, *supra* note 111.

178. *Id.* at 763.

have earlier called Fiss' hierarchical view of the law undermines his commitment to the republican tradition. That view leads Fiss to conclude that, unless adjudication authoritatively determines public values, it cannot be a process by which such values are created. Yet there are many ways in which political action can take place in courtrooms.[179] Instead of seeing the judge as determining public values, we might see litigants creating them as they consider their situation, determine strategy, work out arguments, and so on. On this view, the public values are created in litigation — and in demonstrations, lobbying efforts, fund-raising efforts, churches, and so on indefinitely — as well as in the adjudication, authoritative for the moment, of a case by the Supreme Court. Fiss rightly regards *Brown v. Board of Education* as a triumph for public values. To him, the hero in *Brown* is Earl Warren.[180] On the alternative view there are no heroes. But we would do well to attend to what Melvin Alston, Lucille Bluford, Linda Brown, Charles Hamilton Houston, and Thurgood Marshall did to create public values through litigation.[181]

The third critique of the appeal to public values is in some ways a generalization of the emphasis in the first and second on the utopianism of the appeal in light of who today's judges actually are. Those who ask judges to appeal to public values do so in the usual measured tone of the academy.[182] But, to the extent that their appeal seeks to revitalize the republican tradition, it asks for a great deal. At least as it was imagined in the tradition the framers knew, republicanism had a social base. Citizens had to have secure economic positions, allowing them to avoid personal domination by individuals on whom they depended, in order that they be able to develop public values in public life without fear of retaliation in their other activities. They had to have sufficient education in public matters and in their republican traditions to understand the virtues of the republican polity, in order that

179. For a catalogue with examples, see Gabel & Harris, *supra* note 107.

180. *See* Fiss, *supra* note 111, at 758.

181. Melvin Alston was a black teacher in Norfolk, Virginia, who became the lead plaintiff in the first case that reached a court of appeals on the issue of whether it was constitutional for a city to pay its black and white teachers different salaries. *See* Alston v. School Bd., 112 F.2d 992 (4th Cir.), *cert. denied,* 311 U.S. 693 (1940). Lucille Bluford is a black journalist who was the plaintiff in a series of cases challenging Missouri's failure to provide a graduate program in journalism for black students. *See* Bluford v. Canada, 32 F. Supp. 707 (W.D. Mo. 1940); State *ex. rel.* Bluford v. Canada, 348 Mo. 298, 153 S.W.2d 12 (1941). She later had a distinguished career as editor of a major black newspaper; a relative, Guion Bluford, was the first black astronaut. On Houston, see G. MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983).

182. It would take more than this footnote to explore fully the sociology of this phenomenon. I note here only the social location of the authors I have discussed, both within the legal academy and as part of an academy with its own social location.

they be able to resist its subversion from within and without. They had to have a sympathetic understanding of the life situations of people occupying different social positions from theirs, in order that the values they develop be fully public. If these social conditions are satisfied, it might be sufficient to think of public values as those that emerge from a process of informed deliberation and discussion among equals; if they are not, there is little to commend the procedural approach.

Creating the social conditions for republicanism calls for rather large transformations in our present social arrangements. Consider only the decisions of the Supreme Court in the past fifteen years which would have to be repudiated if the courts were to attempt to create the social conditions on which public values could rest: *Board of Regents v. Roth,*[183] denying a presumption in favor of a person's right to a government job; *San Antonio Independent School District v. Rodriguez,*[184] denying that education is a fundamental interest for purposes of equal protection analysis; *Lindsey v. Normet,*[185] denying that housing, and more broadly the necessities of life, are fundamental interests for the same purposes. To the extent that our system of public assistance reproduces dependency, it too would have to be restructured.

Of course the proponents of public values would welcome these results.[186] But there is plenty of reason to think that today's judges would not. Not only have they decided the cases that would have to be repudiated to create the conditions for republicanism, they have said explicitly that, as they see the Constitution, it cannot be the vehicle for the creation of the conditions under which there could be public values. *Washington v. Davis*[187] adopted the rule that the equal protection clause was violated only when the state actor involved had a discriminatory intent. Justice White included among his reasons for rejecting the alternative "effects" rule, a fear that the effects rule would require radical revision of policies in a wide range of areas.[188] As with any rule, one can limit the effects rule so that it would not have the consequences the Court feared.[189] That in turn would vitiate the appeal to public values.

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183. 408 U.S. 564 (1972).

184. 411 U.S. 1 (1973). *But see* Plyler v. Doe, 457 U.S. 202 (1982).

185. 405 U.S. 56 (1972).

186. *See, e.g.,* Michelman, *Process and Property in Constitutional Theory,* 30 CLEV. ST. L. REV. 577, 584-85, 590-92 (1982).

187. 426 U.S. 229 (1976).

188. 426 U.S. at 248.

189. *See, e.g.,* Eisenberg, *Disproportionate Impact and Illicit Motive,* 52 N.Y.U. L. REV. 36, 113 (1977).

In the end, the appeal to public values is a radical one. No matter how calm the tones in which it is offered, the suggestions that courts today do in fact sometimes appeal to such values, and that they should do more of it, are unlikely to fool many people or judges for very long.

CONCLUSION

The works I have discussed have more than their anti-formalism in common. Unlike other works in constitutional theory, they rarely take the decisions of the Supreme Court to define the subject matter. Cover and Fiss have written "Forewords" to the annual review of the Supreme Court's work in which decided cases are dragged in by the heels. Even where decided cases play a larger role, the degree to which they are taken to define the subject matter is a measure of the degree to which anti-formalist themes have been subordinated.

I take that to be an encouraging sign. Anti-formalism requires a radical decentralization of law, as in anarchist anti-formalism, coupled with social transformation to create the conditions for republicanism, as in the appeal to public values. It is one version of contemporary legal utopianism.

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